

STATE OF MICHIGAN
COURT OF APPEALS

DANE ISCARO,

Petitioner-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

UNPUBLISHED

May 28, 2013

No. 304976

Ingham Circuit Court

LC No. 09-001646-AA

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Petitioner, Dane Iscaro, appeals by delayed leave granted the circuit court's order denying his administrative appeal and affirming the decision of respondent, Department of Corrections, that petitioner engaged in major misconduct for violating the policies regarding substance abuse and dangerous contraband. Because we conclude that the circuit court erred by applying the deferential standard of review rejected by *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 111; 754 NW2d 259 (2008), we vacate in part and remand for further proceedings.

Petitioner is an inmate in respondent's custody. While packing petitioner's belongings, a corrections officer discovered Uniform Commercial Code filing statements, written materials describing how to make and administer narcotics, and a bottle containing urine in petitioner's cell. Because of his possession of these items, petitioner received three major misconduct violations.

Petitioner disputed the major misconduct violations, and respondent held a hearing after which the hearing officer concluded that petitioner's possession of the Uniform Commercial Code filing statements failed to qualify as contraband. However, the hearing officer concluded that petitioner's possession of the bottle of urine constituted possession of dangerous contraband and petitioner's possession of written materials describing how to make and administer narcotics constituted substance abuse.

Petitioner appealed the hearing officer's decision to the circuit court, wherein he argued that there was insufficient evidence to prove the remaining major misconduct violations. Petitioner also argued that because respondent's policy directive does not provide a definition of narcotics paraphernalia, he lacked notice that he was in possession of narcotics paraphernalia in violation of his due process right to notice. The circuit court cited MCL 791.255 and explained

that its review of the hearing officer's decision was limited to determining whether the department's actions were authorized by law or rule and whether the decision was supported by competent, material, and substantial evidence. The circuit court concluded that there was competent, material, and substantial evidence to support the finding that petitioner possessed dangerous contraband and narcotics paraphernalia.

The circuit court then addressed petitioner's argument that he was denied due process because the policy directive failed to define narcotics paraphernalia. The circuit court noted that petitioner does not deny possession of the paperwork, but contends that he had no notice that possession of "narcotic recipes" was prohibited. The circuit court noted that the policy directive does not define drug paraphernalia, but that MCL 333.7451 does define the term, and that the definition set forth under MCL 333.7451 includes "instructional recipes" for manufacturing narcotics within the meaning of narcotics paraphernalia. The circuit court cited *Nat'l Ass'n of Home Builders v Defenders of Wildlife*, 551 US 644, 672; 127 S Ct 2518; 168 L Ed 2d 467 (2007), for the proposition that "[a]n agency's interpretation of the meaning of its own regulations is entitled to deference unless plainly erroneous or inconsistent with the regulation." The circuit court concluded that respondent's interpretation of narcotics paraphernalia to include the paperwork in petitioner's possession was not "plainly erroneous" or "inconsistent with the regulation." Thus, the circuit court concluded that the evidence of possession of narcotics paraphernalia was "sufficient to satisfy due process" and accordingly denied petitioner's alleged due process violation because petitioner was on notice that narcotics paraphernalia was prohibited and the paperwork he possessed fit respondent's definition of narcotics paraphernalia.

On appeal, petitioner first argues that the circuit court erred by applying the incorrect standard of review to the agency's interpretation of its own directive. Specifically, petitioner argues that the circuit court erroneously relied on the deferential standard of review set forth in *Nat'l Ass'n of Home Builders*, 551 US at 672, and that the circuit court should have granted only respectful consideration to the agency's interpretation of narcotics paraphernalia as used in its policy directive pursuant to *In re Rovas Complaint*, 482 Mich at 111. Thus, petitioner argues that the circuit court should not have concluded that narcotics paraphernalia plainly includes the paperwork of which he was in possession, and that because the paperwork he possessed is not plainly included in the definition of narcotics paraphernalia, he lacked notice that he was in violation of the policy directive.

Judicial review of an agency's decision is limited to determining whether the decision was authorized by law or rule and whether the agency's findings of fact were "supported by competent, material, and substantial evidence on the whole record." Const 1963, art 6, § 28; MCL 791.255(4). Our review of a circuit court's review of agency action is limited to determining whether "the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence to the agency's factual findings." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). This review "is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence." *Id.* at 234-235. A finding is clearly erroneous when, after review of the entire record, this Court is left with a definitive and firm conviction that a mistake has been made. *Id.* at 235.

We review de novo questions regarding the standard of review appropriate to a particular decision. *Bandeen v Pub Sch Employees Retirement Bd*, 282 Mich App 509, 514; 766 NW2d 10 (2009).

The issue before us is whether the circuit court applied an erroneous standard of review when it considered the agency's interpretation of narcotics paraphernalia and ultimately adopted the agency's interpretation. In *In re Rovas Complaint*, 482 Mich at 99-109, the Court considered the proper standard, under Michigan law, for reviewing an agency's construction of a statute. The standard articulated by the Court in *In re Rovas Complaint* also applies to our review of an agency's construction of rules and policies. See *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 47-48; 761 NW2d 269 (2008); *Monroe v State Employees Retirement Sys*, 293 Mich App 594, 606-607; 809 NW2d 453 (2011); *Schreur v Dep't of Human Servs*, 289 Mich App 1, 9; 795 NW2d 192 (2010), aff'd in part, vacated in part on other grounds 488 Mich 1042; 795 NW2d 124 (2011).

In its articulation of the standard of review applicable to an agency's interpretation, our Supreme Court specifically rejected the concept of "deference," and held that the plain language of the statute at issue controls. *In re Rovas Complaint*, 482 Mich at 108. The Court explained that "the agency's interpretation is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *Id.* Further, it noted that agency interpretation can be helpful for the construction of "doubtful or obscure provisions," but stressed that agency interpretation cannot be upheld when it conflicts with the plain meaning of a statute. *Id.* The Court explicitly stated that "'respectful consideration' is not equivalent to any normative understanding of 'deference.'" *Id.* Moreover, it specifically declined to adopt the "*Chevron*¹ deference doctrine" employed by federal courts for review of agency interpretations. *Id.* at 109.

In this case, the circuit court concluded that the agency's interpretation of the term was entitled to deference, citing *Nat'l Ass'n of Home Builders*, 551 US at 672, in support. The *Nat'l Ass'n of Home Builders* case cites *Chevron* and applies *Chevron* deference. Thus, the circuit court afforded *Chevron* deference to respondent's interpretation of narcotics paraphernalia contrary to the mandate of *In re Rovas Complaint*.² Consequently, we agree with petitioner that the circuit court applied an incorrect standard of review. We accordingly vacate that portion of the circuit court's decision and remand for further proceedings. On remand, the circuit court should review petitioner's claims regarding the meaning of narcotics paraphernalia under the standard enunciated by *In re Rovas Complaint*, giving the agency's interpretation only

¹ *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

² We reject respondent's argument on appeal that *In re Rovas Complaint* is inapplicable to the instant case because the language at issue here is a policy directive and *In re Rovas Complaint* considered a statute. The distinction between statutes and policy directives articulated in *Boyd* has no bearing on the proper review of agency interpretation of its own policy directives; rather, *Boyd* merely noted that unlike statutes, policy directives do not carry the force of law. *Boyd*, 220 Mich App at 236.

“respectful consideration,” and ultimately allowing the plain language of the policy to control its determination whether the paperwork possessed by petitioner constitutes narcotics paraphernalia.

Petitioner also argues that the circuit court erred by affirming the decision that he possessed dangerous contraband because the bottle of urine could not be connected to him. We decline to address this issue because petitioner did not include this issue in his statement of issues as required by MCR 7.212(C)(2), and because petitioner failed to cite any relevant authority to support his position, thus the issue is not properly preserved for appellate review and is abandoned. See MCR 7.212(C)(2); *Preston v Dep’t of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991); *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998).

Vacated in part and remanded. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra